ably commit crimes with impunity. If such situations arise, they will be met by extra-legal action. The real question is whether executive immunity from arrest is of sufficient practical necessity to require a departure from the traditional Anglo-American principle of equality before the law, and to justify reading an exception into criminal statutes in their terms absolute.[30] To give an elected governor the personal immunity of an hereditary king is so contrary to the spirit of American institutions that a greater practical necessity than exists in this case should be required in order to reach that result.[31]

Judicial readiness to resist the executive prerogative when carried beyond its legal limits has been one of the glories of the common-law tradition. Bacon to the contrary notwithstanding, the judges have not been "lions under the throne." The action of the Illinois court in this case, in the face of a threat by the governor to call out the militia to resist arrest, is reminiscent of Coke's sturdy resistance to James I in the famous *Case of the Prohibitions*.[32]

EFFECT OF ABANDONMENT OF DOMICIL OF CHOICE. — It is to the interest of organized society that the civil status of everyone be governable by some one system of civilized jurisprudence. In order to effectuate this interest, the law has built up the concept of domicil,[1] which may be described,[2] roughly, as a person's "legal home."[3] Obviously, this includes two elements — one of fact, the other of law. Where one has established his "domestic hearth" is a question of fact. But, since domicil is the legal conception of and not necessarily the actual home of a person, rules of law and circumstances of fact may not, at times, coincide. Thus, though it is factually possible for one to have any number of homes or none at all, it is axiomatic in the common law that no person can at the same time have more than one domicil,[4] and that everyone must

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[30] The procedure following the return of an indictment is entirely regulated by statute. See 1913 HURD'S REV. STATS. 877, §§ 414–420. It is provided that the judge *shall* fix the amount of bail (§ 414), that the clerk of court *shall* issue process of *capias* (§ 415), and that the sheriff *shall* make the arrest (§ 417). None of these officials are given any discretion in the matter.

[31] It may be argued that no one could take the governor's place in case he is convicted. The constitution provides for the conduct of the government in case of death, conviction on impeachment, failure to qualify, resignation, absence from the state, or "other disability" of the governor. See ILL. CONST., Art. V, § 17. This would seem to cover arrest and imprisonment, which is certainly a "disability." It is hardly a case for the application of the maxim of *eiusdem generis*.

[32] 12 Co. 63 (1607).

[1] Both the term "domicil" and the legal idea which it represents were conceived in the Roman law. See 4 PHILLIMORE, INTERNATIONAL LAW, 3 ed., § 38. The common-law theory of domicil did not begin to take shape until the reign of Charles II. See 2 BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS, 1908 ed., 15. And see *In re* Capdevielle, 2 H. & C. 985, 1018 (1864).

[2] Eminent authorities have found difficulty in agreeing upon an exact definition of domicil. See DICEY, DOMICIL, Appendix, n. 1.

[3] See BEALE, SUMMARY, CONFLICT OF LAWS, § 28.

[4] Abington *v.* North Bridgewater, 23 Pick. (Mass.) 170 (1840). There are no cases *contra*. There are, however, strong *dicta* asserting the possibility of double domicil. See *In re* Capdevielle, *supra*, at 1018. It has been suggested that a person may, at the

have a domicil somewhere.[5] Consequently, while this relation between person and place is usually a natural one, it must sometimes be determined by arbitrary rules of law.[6]

There is necessity for the application of such a rule in determining the effect of the abandonment of a present domicil. Where, without more, one abandons his domicil of origin [7] with intent never to return, it is agreed that the old domicil is retained.[8] If, however, a domicil of choice had been acquired, and then abandoned, there is a decided conflict in the authorities as to the location of the domicil *in itinere*. Is there a valid distinction between these cases?

An understanding of this question involves an examination of the bases of domicil. The reasons for choosing domicil [9] as the determinant of civil status rest both in justice and expediency. For not only is it fair that the personal law which governs one should be that of the place he has chosen as his home, but it is also at that place that he is most consistently within reach of the sovereign's power. Since these considerations underlie the

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same time, have different domicils, but for different purposes. See Somerville *v.* Somerville, 5 Ves. Jr. 750, 786 (1801). And see 4 PHILLIMORE, *op. cit.*, c. 5. But this seems to be the result both of an over-caution and a confusion of domicil with residence. See DICEY, DOMICIL, 62–65.

Double domicil seems to have been possible in Roman law. See DIG. 50, t. 1, l. 5. See 34 HARV. L. REV. 543, n. 4. Modern civilians accord. See DONELLUS, DE JURE CIVILI, l. 17, c. 12. But the existence of a later domicil is ignored, for one draws his personal law from the earliest established domicil still adhering to him. See 8 SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, § 359. The result reached is thus practically the same as that of the common law.

[5] Shaw *v.* Shaw, 98 Mass. 158 (1867); Udny *v.* Udny, L. R. 1 H. L. Sc. App. 441, 453, 457 (1869). But see Matter of Grant, 83 Misc. 257, 266, 144 N. Y. Supp. 567, 573 (1913). The Roman law was *contra*. See DIG. 50, t. 1, l. 27 (2). And so in the later civil law. See VOET, AD PANDECTAS, l. 5, t. 1, no. 92. But, though the old domicil ceased upon abandonment, the subjection of the person to its laws continued. See 8 SAVIGNY. *op. cit.*, § 359. The result reached is thus only theoretically different from that of the common law. But see Interdiction of Dumas, 32 La. Ann. 679 (1880). And see GERMAN CIVIL CODE, § 7.

[6] It is for the law of the *forum*, and for that law only, to define the operative facts and rules of law which make up domicil. See J. H. Beale, "The Progress of the Law, 1919–1920, The Conflict of Laws," 34 HARV. L. REV. 50. And see 28 YALE L. J. 810, 813.

[7] Every person, at birth, is assigned by the law the domicil of the person with whom he is legally bound to live. In Roman law, if the infant were legitimate, it took the domicil of its father. See CODE, 10, t. 31, l. 36. And, if illegitimate, that of its mother. See DIG. 50, t. 1, l. 9. The common law accords. *In re* Craignish, [1892] 3 Ch. 180; Blackstone *v.* Seekonk, 8 Cush. (Mass.) 75 (1851).

Some writers define domicil of origin as the domicil of the child when he reaches majority. See 2 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS, 3 ed., § 73; WESTLAKE, PRIVATE INTERNATIONAL LAW, 2 ed., § 245. But the authorities are *contra*.

[8] Somerville *v.* Somerville, 5 Ves. Jr. 750 (1801); Gilman *v.* Gilman, 52 Me. 165 (1863); Bell *v.* Kennedy, L. R. 1 H. L. Sc. App. 307 (1868). But see Matter of Rice, 42 Mich. 528, 4 N. W. 284 (1880); Brown *v.* Beckwith, 58 W. Va. 140, 143, 51 S. E. 977, 978 (1905).

[9] Allegiance, rather than domicil, has been suggested as the criterion from which the consequences of civil status should flow. See MINOR, CONFLICT OF LAWS, § 66, n. 7. This was the rule in the ancient state. See FOOTE, PRIVATE INTERNATIONAL JURISPRUDENCE, 4 ed., xl. And it is recovering its pre-eminence on the Continent. See BAR, LEHRBUCH DES INTERNATIONALEN PRIVAT- UND STRAFRECHTS, § 30 (Gillespie's translation, 110). And see STAT. 24 & 25 VICT., c. 121. But the common law has clung to the test of domicil. Brunel *v.* Brunel, L. R. 12 Eq. Cas. 298 (1871). See 23 HARV. L. REV. 211.

continued recognition of domicil as a valuable criterion of personal law, they should be satisfied whenever a change of domicil occurs. Consequently, in order to acquire a new domicil, there must not only be an intent [10] to make the new place a home, but that *animus* must be coexistent with the *factum* of actual presence [11] there. After an abandonment of present domicil and before these two requirements are satisfied in the acquisition of a new, there is necessity for an arbitrary rule of law fixing the domicil. Following analogies [12] in other branches of the law, the general rule is that the old domicil persists.[13]

The English rule,[14] however, varies from this where there is an abandonment of a domicil of choice. In such case, it is held that the original domicil, which is merely kept in abeyance by the person's positive act and intent, immediately reverts, to be pushed aside again only on the

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[10] Bell *v.* Kennedy, *supra;* Dupuy *v.* Wurtz, 53 N. Y. 556 (1873). But see Hicks *v.* Skinner, 72 N. C. 1 (1875). Unexplained continued presence is presumptive evidence of intent. Bruce *v.* Bruce, 2 B. & P. 229, note (1790). The early English cases required an intent to remain "permanently" in the new home. Bempde *v.* Johnstone, 3 Ves. Jr. 198 (1796). But later opinions substituted an intent to remain "indefinitely." Att'y Gen'l *v.* Pottinger, 6 H. & N. 733 (1861). In this country, a less settled intention will suffice, as, *e.g.*, to stay until one can find a better place. Wilbraham *v.* Ludlow, 99 Mass. 587 (1868).

The Scotch law requires an intent to acquire a new civil status. Donaldson *v.* M'Clure, 20 Sc. Sess. Cas., 2d Sess., 307 (1857). And such seemed to be the unconsidered opinion of some of the early English judges. See Moorhouse *v.* Lord, 10 H. L. Cas. 272 (1863); Att'y Gen'l *v.* Countess de Wahlstatt, 3 H. & C. 374, 387 (1864). This view is maintained by some writers. See 2 FRASER, HUSBAND AND WIFE, 2 ed., 1265. But the common-law authorities are clearly *contra*. Douglas *v.* Douglas, L. R. 12 Eq. Cas. 617 (1871). See J. H. Beale, *supra*, 34 HARV. L. REV. 50, 52. And see DICEY, DOMICIL, 80, note z.

[11] Goods of Raffenel, 3 Sw. & Tr. 49 (1863); Talmadge *v.* Talmadge, 66 Ala. 199 (1880). The presence at the new domicil, which may be momentary, must be actual. Lyall *v.* Paton, 25 L. J. Ch. 746 (1856); Williams *v.* Roxbury, 12 Gray (Mass.) 21 (1858). It was at one time thought that a new domicil could be acquired upon *death in itinere* toward an intended home. See Munroe *v.* Douglas, 5 Madd. 379, 405 (1820). And later, that it would suffice if the person merely *be en route*. See Forbes *v.* Forbes, Kay, 341, 354 (1854). And see 1 WHARTON, CONFLICT OF LAWS, 3 ed., § 58. But this notion has now been rejected by the highest authorities. Lyall *v.* Paton, *supra;* Graham *v.* Public Administrator, 4 Bradf. (N. Y.) 127 (1856).

[12] There is a close analogy between possession and domicil. As the state has an interest in not having chattels without possessors, so has it an interest in not having persons without domicils. Consequently, in the absence of actual possessor or home, it posits a continuance of possession or domicil. *Cf.* 1 DEMOLOMBE, COURS DE CODE NAPOLÉON, 4 ed., § 351. So also, for this purpose, is there a possible parallel between nationality and domicil. See *Ex parte* Weber, [1916] 1 K. B. 280 n, 283. But see Stoeck *v.* Public Trustee, [1921] 2 Ch. 67, 79. See RECENT CASES, *infra*, p. 210.

[13] Opinion of the Justices, 5 Metc. (Mass.) 587 (1843); Gilman *v.* Gilman, 52 Me. 165 (1863). This principle lies at the bottom of most of the rules as to acquisition and change of domicil, and is to be distinguished from a mere presumption of continued intent to retain the old home. Att'y Gen'l *v.* Rowe, 1 H. & C. 31 (1862).

[14] Udny *v.* Udny, L. R. 1 H. L. Sc. App. 441 (1869), overruling Munroe *v.* Douglas, *supra;* King *v.* Foxwell, L. R. 3 Ch. D. 518 (1876). The English rule is followed in Scotland. Colville *v.* Lauder, 17 Morison Dict. Dec., tit. Succession, 14963, Appendix 1. (1800). But it seems not to be held on the Continent. See JACOBS, DOMICIL, § 202.

The leading decision seems to have rested upon English Prize Cases. The Indian Chief, 3 C. Rob. Adm. 12 (1801); La Virginie, 5 C. Rob. Adm. 98 (1804). These involve national character in time of war and are wholly unsafe as guides in ordinary cases of civil domicil. See DICEY, DOMICIL, Appendix, note 3.

attainment of another actual home.[15] This "reverter theory" is artificial in the extreme. There seems to be no valid basis for imposing upon a man a domicil in a country which he may never have seen and to which he may never intend to go. Accordingly, the weight of American authority has repudiated this rule.[16] A few cases [17] in this country have suggested that, while it might be applicable to a situation where the abandoned domicil of choice was foreign to the original domicil, it should not be followed where both domicils were under one national flag. The basis of domicil in common-law jurisdictions is not allegiance,[18] but a home in a legal territorial unit. This so-called "quasi-national view" [19] accedes to an unwarranted distinction, and cannot be supported on authority.[20]

While it is clear that most American jurisdictions do not fully accept the English doctrine, many *dicta* [21] and most of the few cases [22] which have arisen on the point adopt a modified rule first announced by Judge Story.[23] Under this view, the domicil of origin would revert immediately upon the abandonment of the domicil of choice when, and only when, the person has given up his acquired domicil with fixed present intent to establish a home in the land of original domicil.[24] There seems no reason for

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[15] The court seems to have been influenced by the then idea of perpetual allegiance. Doubt was once expressed whether an Englishman could change his English domicil. See Curling *v.* Thornton, 2 Add. 6, 17 (1823). This doubt was soon put at rest. Stanley *v.* Bernes, 3 Hagg. Eccl. 373 (1830). And, to-day, every person who is *sui juris* and capable of controlling his personal movements may change his domicil at pleasure.

[16] First National Bank *v.* Balcom, 35 Conn. 351 (1868); Succession of Steers, 47 La. Ann. 1551, 18 So. 503 (1895). See Plant *v.* Harrison, 36 Misc. 649, 655, 74 N. Y. Supp. 411, 415 (1902). But see, *contra*, Bremme's Estate, 13 Pa. Co. Ct. 177 (1892). Much influenced by the English views of birth, locality, and family history, Udny *v.* Udny is said not to be applicable to conditions in this country. See Succession of Steers, *supra*, at 1553. And the American judges have frequently laid down the general rule broadly, without noting the English exception. Borland *v.* Boston, 132 Mass. 89, 95 (1882). See BEALE, SUMMARY, CONFLICT OF LAWS, § 32.

[17] First National Bank *v.* Balcom, *supra;* Succession of Steers, *supra*.

[18] See note 9, *supra*.

[19] See JACOBS, DOMICIL, § 207.

[20] Church *v.* Rowell, 49 Me. 367 (1861). See Valentine *v.* Valentine, 61 N. J. Eq. 400, 406, 48 Atl. 593, 595 (1901). And it is to be noted that Udny *v.* Udny itself concerned a case in which the state of original domicil and that of acquired domicil were component parts of the same nation.

[21] See Miller's Estate, 3 Rawle (Pa.), 312, 319 (1832); State *v.* Hallett, 8 Ala. 159, 161 (1845); Russell *v.* Randolph, 11 Tex. 460, 464 (1854); Reed's Appeal, 71 Pa. St. 378, 383 (1872); Sheldon *v.* Forsman, 17 Lanc. L. Rev. (Pa.) 85, 87 (1899); Denny *v.* Sumner County, 134 Tenn. 468, 476, 184 S. W. 14, 16 (1916); Stein *v.* Fleischmann Co., 237 Fed. 679, 680 (S. D. N. Y., 1916).

[22] Matter of Wrigley, 8 Wend. (N. Y.) 134 (1831); Allen *v.* Thomason, 11 Humph. (Tenn.) 536 (1851); Mills *v.* Alexander, 21 Tex. 154 (1858); *Re* Walker, 1 Lowell, 237 (U. S. D. Mass., 1868); Kellar *v.* Baird, 5 Heisk. (Tenn.) 39 (1871); Bremme's Estate, 13 Pa. Co. Ct. 177 (1892).

[23] See STORY, CONFLICT OF LAWS, 8 ed., § 47 (17). To the same effect is the decision of a Scotch court. Colville *v.* Lauder, *supra*.

[24] Mere intention to return to the domicil of origin at a future time is not sufficient. Stanley *v.* Bernes, 3 Hagg. Eccl. 373 (1830); State *ex rel.* Graham, *in re* Toner, 39 Ala. 454 (1864). Nor is mere return without abandonment of the acquired domicil. Maxwell *v.* M'Clure, 6 Jur. (N. S.) 407 (1860); Williamson *v.* Parisien, 1 Johns. Ch. (N. Y.) 389 (1815). The necessary *factum* to accomplish reverter is quitting the country of acquired domicil. Goods of Raffenel, 3 Sw. & Tr. 49 (1863). But the transit to the domicil of origin need not be direct. *Re* Walker, *supra*.

making this exception.[25] If intent alone be necessary, why does it not suffice to aquire a domicil of choice upon abandonment of the domicil of origin? The authorities are conclusive against this.[26]

A recent Iowa case[27] squarely rejects the distinction, and, it is submitted, properly. Once a domicil is imposed by operation of law or acquired *animo et facto*, that domicil should be retained until a new one is acquired upon the concurrence of the necessary mental and physical elements.[28] Too important consequences flow from domicil to admit of its law being encumbered with artificial exceptions and unnecessary distinctions. When general principles are arbitrarily tampered with, a regretted distinctive local jurisprudence naturally results in a field where uniformity is much desired.

DUE PROCESS AND RETROSPECTIVE LEGISLATION. — Retrospective legislation is not *per se* unconstitutional[1] in the United States. It may, however, be invalid because it runs athwart the due-process clause.[2] To what extent is it due process for a legislature to compel one man to surrender property to another, predicating its action on a past transaction which gave rise to no legal compulsion? Clearly, due process does not allow a legislature by mere fiat unpredicated upon some prior transaction to give B a claim against A.[3] It is suggested[4] that the same objection is valid in two other situations although the legislative fiat is there based upon some prior transaction: first, where the transactions of the parties have created a legal obligation, the remedy for which has been withdrawn by law, as by a statute of limitations; second, where the transactions created no legal obligation because of some irregularity. Such an analysis is sound in pointing out that A holds his property equally free from enforcible claims in the three cases, and so the legislature in substance legislates A's property to B.[5] That

[25] But see JACOBS, DOMICIL, § 191.

[26] See note 8, *supra*.

[27] *In re* Jones' Estate, 182 N. W. 227 (Ia., 1921). For the facts of this case, see RECENT CASES, *infra*, p. 202.

[28] Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61 (1892). See 33 HARV. L. REV. 863.

[1] League *v.* Texas, 184 U. S. 156 (1901); Luria *v.* United States, 231 U. S. 9 (1913); Drehman *v.* Stifle, 8 Wall. (U. S.) 595 (1869). It was early held that the prohibition as to *ex post facto* laws applied only to criminal matters. Calder *v.* Bull, 3 Dall. (U. S.) 386 (1798). In several states there are constitutional provisions expressly barring retrospective legislation, but the effect of such provisions is outside the scope of the present discussion.

[2] Of course retrospective legislation may also be unconstitutional as impairing the obligation of contracts, or as a usurpation of judicial power.

[3] See Medford *v.* Learned, 16 Mass. 215, 216 (1819).

[4] Danforth *v.* Groton Water Co., 178 Mass. 472, 59 N. E. 1033 (1901).

[5] There are only a limited number of cases on the problem of the constitutionality of retrospective statutes, because in many cases the courts do not reach that question, having regard to the settled rule against construing statutes as retroactive unless there be express language which requires that construction. See COOLEY, CONSTITUTIONAL PROHIBITIONS, 7 ed., 529; ENDLICH, INTERPRETATION OF STATUTES, 362. This rule is qualified by holding that it is not applicable where a statute merely adds a remedy for an existing right and does not affect vested rights. In fact the statute is given a prospective effect entirely, viewing the situation as of the time the remedy is applied. Berkowitz *v.* Arbib, 230 N. Y. 261, 130 N. E. 288.